INJURY TO UNBORN CHILD—ITS RIGHT TO SUE.

In the fall term of the Superior Court of Hartford County, Conn., Roraback, J., decided that an infant could not maintain an action for injuries received while in "ventre sa mere." We find the same point decided in the same way in *Allaire* v. *St. Luke's Hospital*, 56 N. E. Rep. 638, Boggs, J., dissenting. We infer that the court makes no distinction between injuries arising from negligence or intention, by the mother or third parties; or resulting from wrongful act of one having notice of its existence and paid for its care, and one who has no knowledge of its existence whatever. The reasons given are that the infant in its prenatal stage is "pars viscerum matris;" and that no precedent can be shown to support this unheard-of action.

The two prior cases against the infant's right to sue are differentiated from the present one, in that, *Dietrich* v. *Inhabitants of Northampton*, 138 Mass. 14 (decided in 1884), was an action by the administrator for a child prematurely born and dying immediately, while the infant here survived; and that in *Walker* v. *Railway Co.*, 28 L. R. A. (decided in 1891), the ground of the decision was the lack of notice on the part of the railway company of the child's existence; the defendants here knowing the mother to be enceinte and receiving pay for care of mother and child.

At the earliest common law the infant was "pars viscerum matris" merely. But the rule of the civil law considering it as in esse for all beneficial purposes soon softened the rigor of the common law. The infant could take by devise and under the statute of distributions; could be vouched on a recovery, be an execution, and have an injunction lie in its favor. *Hellerson* v. *Woodford*, 4 Ves. 227. In this case Bullor, J., asked: "Why should not children in ventre sa mere be considered as generally in existence? They are entitled to all the privileges of other persons." As to property rights this principle is undisputed. Is there sufficient reason to keep it from including actions of tort?

In *Walker* v. *Railway Co.*, cited supra, which contains the learning on this subject, the chief justice was non-committal, the others against this right. In arguing against it, O'Brien, Asst. J., puts very forcibly the impossibility of proof, and the danger of making "lusus scientiæ" out of "lusus naturæ" in a court of law. There is force in this, but not enough, we submit, to justify depriving an infant of his action, where he can show the causal connection, merely because of the difficulty of proof in general. Were a

doctor deliberately and with malice, to put out the eyes of an unborn infant, should not the infant, if it survives, have its action? Its injury is the mother's only by a fiction of the law—perhaps the mother could only sue for loss of services; a loss insignificant compared to the infant's loss of his eyes. The loss is peculiarly his, and will have to be born by him while he lives, so there seems no good reason why in such a case it should not recover from the wrong doer.

It is true there is no precedent. As such occurrences are not infrequent, as observed by O'Brien, Asst. J., in *Walker* v. *Railway Co.;* this bears against the right, but not, we think, conclusively. "Precedents," says Mansfield, J., "were to illustrate principles and give them fixed certainty." While there is no precedent, the civil law rule considering the infant as "in esse" when it was for its benefit to do so, is a living principle in our law to-day, and there seems to be no such distinction between rights of property and rights to actions of tort, to admit the infant to one and exclude it from the other. Under Lord Campbell's and similar acts, an infant "in ventre sa mere" can sue for the death of its relative that took place while it was yet unborn. The *George* v. *Richard,* L. R. 3 Adm. & Ecc. 466; *Nelson* v. *Galveston R. R.,* 78 Tex. 62.

Although the Illinois court did not consider the argument by analogy of O'Brien, C. J., in *Walker* v. *Railway,* cited supra, and although the learned chief justice left it "an open question," his reasoning seems very convincing. It is undisputed that the State can punish as murder or manslaughter a wilful injury to an unborn infant, that results in death after parturition has taken place and its independent existence has begun. Now, if all crimes are also private wrongs, affecting the individual and also the State, 4 Black. 6, the infant has suffered a private wrong. Is it any less a private wrong if instead of being killed the infant was crippled for life? There seems no cogent reason for giving to an infant for purposes of righting public wrongs a status that is to be denied it when seeking redress for its private wrongs.

If this right is given, it is clear that it should be restricted. In the early period of gestation, as remarked by Boggs, J., in the present case, the infant may well be considered as "pars viscerum matris." But when the fœtus reaches a stage, where, if the mother should die, it might live, as was the case in *Allaire* v. *St. Luke's Hospital,* justice might best be subserved by giving the infant his action.